IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

| BRET A. BROADDUS Plaintiff, |) |
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| V. |) No. No. 08 -cv- 2006 |
| NORTH SHORE VAN LINES, INC. |) Judge Virginia M. Kendall |
| Defendant. | Ó |

AGREED MOTION TO DISMISS

Now comes Defendant, NORTH SHORE VAN LINES, INC.(hereinafter referred to as "Defendant" or "NSVL"), by and through its attorneys, Joel H. Steiner and Axelrod, Goodman, Steiner & Bazelon, and Moves to Dismiss the Complaint herein for failure to state a cause of action, pursuant to Rule 12(b)(6) F.R.Civ.P. and for reasons in support thereof states as follows:

I. STATEMENT OF THE CASE

All facts recited herein are taken from Plaintiff's Complaint herein and the Amended Complaint previously filed by Plaintiff in 07-cv-2713. This cause arises solely out of the interstate transportation of the household goods and belongings of Bret Broaddus (hereinafter referred to as "Plaintiff" or "Broaddus") from Del Ray Beach, Florida to Chicago, Illinois. The only damages alleged by Plaintiff are directly related to the shipment of his goods in interstate commerce and the alleged loss of and/or damage to those goods, notwithstanding the multiple counts and theories asserted in the Complaint.

II. ALL ACTIONS ARE PREEMPTED BY 49 U.S.C.§ 14706

What is commonly known as the Carmack Amendment to the Interstate Commerce Act is now codified as 49 U.S.C. § 14706. All suits for loss or damage to interstate shipments by motor carrier are preempted by 49 U.S.C. §14706, which is a total preemption.

See, for example, *R.E.I. Transport, Inc. v. C.H. Robinson Worldwide, Inc.*,2008 WL 731614, pp. 3-4 (7th Cir. 2008), *Miller v. Reebie Storage and Moving Company*, Inc., 1993 WL 414689 at pg. 4 (N.D. III. 1993), *Morris v. Covan World Wide Moving Incorporated*, 144 F.3d 377, 382-383 (5th Cir. 1998), *Nowakowski, et. al. v. American Red Ball Transit Company, Inc., et. al.*, 288 III. App. 3d 348, 680 N.E. 2d 441 (2nd Dist. 1997), *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 286 (7th Cir. 1997) and *Smith v. United Parcel Service (UPS)*, 296 F.3d 1244 (11th Cir. 2002).

III. THIS SUIT IS A REFILING OF PRIOR ACTION DISMISSED WITH PREJUDICE

On May 15, 2007 Plaintiff Bret Broaddus filed an Amended Complaint in this Court in the matter of Bret Broaddus v. Jim Larkin, et. al., No. 07-cv- 2713 (Doc. No. 21 - copy attached) in which one of the Defendants was Defendant herein, NSVL. That Amended Complaint alleged an identical cause of action, loss or damage to Plaintiff's property occurring as a consequence of the transportation of that property by NSVL from Del Ray Beach, Florida to Chicago, Illinois. Exhibit A to that Amended Complaint (Doc. No. 21-2 - copy attached) is the same inventory and bill of lading as attached to the Complaint herein as Exhibit A and Exhibit B.

On September 11, 2007, Judge Mark Filip entered a Minute Order in No. 07-cv- 2713 (Doc. 31) which set that matter for a status hearing on October 4, 2007 and warned that Plaintiff's failure to appear may result in a dismissal for want of prosecution. This Order was entered as a consequence of Plaintiff's failure to file a response to Defendant's Motion for Summary Judgment.

See Minute Order, Doc. 30.

On October 4, 2007, as reflected in Judge Filip's Minute Order (Doc. 32 - copy attached) "Defendants appear for status hearing. Plaintiff fails to appear." As a consequence thereof, Judge Filip ordered the case dismissed for want of prosecution. Judge Filip's Order provided that the dismissal was initially without prejudice, and granted Plaintiff leave to reinstate on or before November 5, 2007, at which time the dismissal will be with prejudice if no request to reinstate is filed. The Order also struck, without prejudice Defendant's Motion for Summary Judgment. No Motion to Reinstate or Notice of Appeal was ever filed. Consequently, on November 5, 2007 the Dismissal for Want of Prosecution became a dismissal with prejudice and res judicata. Since no appeal was taken, that Order is not subject to attack or challenge.

IV. THE DOCTRINE OF RES JUDICATA REQUIRES DISMISSAL OF THIS SUIT

In the present case all of the elements necessary for the application of the doctrine of res judicata are present. Judge Filip entered a final judgment on the merits when he entered the dismissal for want of prosecution, which became final and with prejudice on November 5, 2007 as a consequence of Plaintiff's failure to move to reinstate. Both 07-cv-2713 and the current action are suits to recover damages for loss or damage to the same shipment of goods in interstate commerce, pursuant to the same bill of lading and manifest, from Del Ray Beach, Florida to Chicago, Illinois. The Amended Complaint in 07-cv-2713 was brought by the Plaintiff herein against Defendant herein, among others.

As stated in *Tartt v. Northwest Community Hosp.*, 453 F.3d 817, 822 (7th Cir. 2006):

Res judicata applies if there is: "(1) a final judgment on the merits in an earlier action, (2) an identity of the cause of action in both the earlier and later suit, and (3) an identity of parties or privies in the two suits." Smith v. City of Chicago, 820 F.2d 916, 917 (7th Cir.1987) (citing Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir.1982)); see Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 338 (7th Cir.1995) (citations omitted).

Because Tartt did not appeal the dismissal of the 7959 action within 30 days, the entry of judgment pursuant to Rules 12(b)(6) and 41(b) on January 29, 2003, amounts to a final judgment on the merits for res judicata purposes. *See* Fed. R.App. P. 4(a)(1)(A); *Horwitz v. Alloy Auto. Co.*, 992 F.2d 100, 102 (7th Cir.1993) (citations omitted); *Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 780 (7th Cir.1986) (citations omitted); *Phillips v. Shannon*, 445 F.2d 460, 462-63 (7th Cir.1971) (citations omitted).

* * * * *

The second part of our res judicata analysis, identity of actions, is met. "[T]wo claims are one for purposes of res judicata if they are based on the same, or nearly the same, factual allegations "Manicki v. Zeilmann, 443 F.3d 922, 925 (7th Cir.2006) (quoting Herrmann v. Cencom Cable Assocs., Inc., 999 F.2d 223, 226 (7th Cir.1993)).

See also, *Kimmel v. Texas Commerce Bank*, 817 F.2d 39, 40-41, (7th Cir.1987), which sustained the authority of a court to dismiss an action *sua sponte* for want of prosecution which stems from the court's inherent power to control its docket rather than from Rule 41(b), but held that such a dismissal was a dismissal is on the merits.

Almost identical procedural circumstances were presented in the unpublished opinion in *Bevins v. H.P. Hood, Incorporated*, 925 F.2d 1468 (Table), 1991 WL 22106 (7th Cir.1991), which cited *LeBeau v. Taco Bell*, 892 F.2d 605, 607-608 (7th Cir.1989) for the proposition that when the Plaintiff appealed the dismissal of its second suit, based upon application of the doctrine of res judicata, as a consequence of the dismissal for want of prosecution of his first suit, the appeal must fail because the Plaintiff did not appeal the first dismissal. Therefore, court did not have jurisdiction to review the district court's dismissal of the first suit. Having failed to either move to reinstate in 07-cv-2713 or appeal from Judge Filip's order of dismissal for want of prosecution, Plaintiff may not seek relief from or avoid the res judicata effect of that prior order.

V. CONCLUSION AND PRAYER

In view of the total preemption by 49 U.S.C.§ 14706 of all state and common law based

claims arising out of the transportation of freight in interstate commerce, and the application of the doctrine of res judicata to Plaintiff's Complaint herein, this suit must be dismissed, with prejudice.

WHEREFORE, for the above and foregoing reasons, Defendant prays that Plaintiff's Complaint herein be dismissed, with prejudice.

North Shore Van Lines, Inc.

By: /s/ Joel H. Steiner

Joel H. Steiner

ARDC# 02720108

One of its Attorneys

Dated: April 29, 2008

OF COUNSEL: Axelrod, Goodman, Steiner & Bazelon 39 South LaSalle Street - Suite 920 Chicago, Illinois 60603 (312) 236-9375 (312) 236-2877 fax

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this April 29, 2008, a copy of the foregoing Agreed Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties registered with the Court's electronic filing system by operation of the Court's system. Parties may access this filing through the Court's system which will send notification of such filing(s) to the following:

Ariel Weisberg Weisberg and Associates 401 South LaSalle St., Suite 403 Chicago, Illinois 60604

/s/ Joel H. Steiner
Joel H. Steiner

DATED: April 29, 2008

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

| BRET BROADDUS and LUANN BROADDUS, |) |
|--|---------------------|
| Plaintiffs, |) 07 CV 2713 |
| v. |) |
| JIM LARKIN, individually and d/b/a NORTH SHORE VAN LINES, INC., NORTHSHORE MOVERS, INC., and NORTH SHORE VAN LINES, INC. |))) Jury Demanded |
| Defendants. |) |

VERIFIED AMENDED COMPLAINT

Plaintiffs Bret Broaddus and Luann Broaddus, by their attorneys, complain against defendants Jim Larkin, individually and d/b/a North Shore Van Lines, Inc., North Shore Van Lines, Inc., and North Shore Movers, Inc. and state that:

- 1. This action is brought under 49 U.S.C. §§14706 et seq. ("Carmack Amendment").
- 2. Plaintiffs Bret Broaddus and Luann Broaddus are individuals and reside in Chicago, Cook County, Illinois.
- 3. Defendant Jim Larkin is an individual doing business as North Shore Van Lines, Inc. and North Shore Movers, Inc. in Libertyville, Lake County, Illinois.
- 4. Defendant North Shore Van Lines, Inc. is a corporation in Libertyville, Lake County, Illinois.
 - 5. Defendant Northshore Movers, Inc. is a dissolved

corporation that conducted operations in Libertyville, Lake County, Illinois.

- 6. All defendants hold themselves out as professional movers.
- 7. Defendants claim to have reputations for reliability, professionalism, and integrity in the moving industry.

 Defendants use various names and identifications in their moving business. Defendant Jim Larkin repeatedly told Mr. Broaddus that these companies were his businesses and that he personally conducted business through these companies.
- 8. The Court has subject matter jurisdiction of this action pursuant to 49 U.S.C. §§14706 et seq.
- 9. Venue lies in this judicial district because the acts giving rise to the Broaddus' claims took place within the Northern District of Illinois.
- 10. The contracts at issue in this complaint were partially made in Lake County. Many of the actions that give rise to this complaint occurred in Lake County.
- 11. Mr. Larkin acted on behalf of North Shore Van Lines, Inc. and held himself out as a carrier in all material aspects, including communications with customers under the business name North Shore Van Lines, Inc.
 - 12. Mr. Larkin and North Shore Van Lines, Inc. also

conducted business as North Shore Movers, Inc. and held themselves out as agents of North Shore Movers, Inc. See Exhibits A and B.

- 13. Mr. Larkin personally contracted with Mr. Broaddus for the shipment of the Broaddus' goods.
- 14. Over the course of several years, Mr. Larkin, his father, and North Shore Van Lines, Inc. provided transportation and services to the Broadduses and issued receipts or bills of lading for all transportation services performed.
- 15. The Broadduses entered into an oral contract with Mr. Larkin and defendants for the moving and transport of certain household and personal belongings, including an automobile, clothing, household furnishings, jewelry, and appliances from Delray Beach, Florida to Chicago, Cook County, Illinois.
- 16. The pertinent and material terms of the oral contract were that:
- a. Defendants would pick up the Broaddus' goods in Delray Beach, Florida.
- b. Defendants would transport the Broaddus' goods by moving truck to their new home in Chicago, Illinois.
- c. The Broadduses would pay the normal carriage fee for the transportation of their goods to Chicago, Illinois.
 - 17. Mr. Larkin and defendants arranged these services with

Mr. Broaddus and communicated directly with Mr. Broaddus.

- 18. Upon delivery, the Broaddus inspected their property and saw that it was damaged and destroyed and that certain property was not delivered at all and was presumably stolen by defendants' agents or employees.
- 19. Mr. Broaddus immediately contacted Mr. Larkin concerning the condition of his property and the stolen items.
- 20. Mr. Larkin and defendants refuse to compensate the Broadduses for these losses.
- 21. The Carmack Amendment provides shippers with the statutory right to recover for actual losses or injuries to their property caused by carriers involved in the shipment. 49 U.S.C. §14706(a)(1).
- 22. As a direct and proximate result of defendants' actions, the Broadduses were damaged in an amount in excess of \$75,000, exclusive of costs and interest for the actual loss and damage to their property caused by defendants.

WHEREFORE, plaintiffs Bret Broaddus and Luan Broaddus demand trial by jury, judgment in their favor and against defendants Jim Larkin, individually and d/b/a North Shore Van Lines, Inc., North Shore Van Lines, Inc., and North Shore Movers, Inc., compensatory damages for the loss and damage to their property in excess of \$75,000, the costs of this action,

and all other appropriate relief.

Plaintiffs' Attorney

Gregory A. Adamski Jenny R. Jeltes Adamski & Conti 100 N. LaSalle Street Chicago, Illinois 60602 312.332-7800

Pursuant to penalties of perjury as provided by law, Bret Broaddus states that:

- 1. I am an adult and am otherwise competent to give evidence.
- 2. If called to give evidence, I would give evidence consistent with this verification.
 - 3. This verification is based upon my personal knowledge.
 - 4. The attached document is true.

Bret Broaddus

DATED: August 14,2007

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NORTHBROOK, IL 60062

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600 WAUKEGAN RD. NORTHBROOK, IL 60062 847-498-6560

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Case 1::03-64-02:065 The Chieffel 124-29 File 123/2002007 Pagage 8fo22 600 WAUKEGAN RD. NORTHBROOK, IL 60062 847-498-6560

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UNITED STATES DISTRICT COURT FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0 Eastern Division

| Bret Broaddus, et al. | | |
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| | Plaintiff, | |
| v. | | Case No.: 1:07-cv-02713 |
| | | Honorable Mark Filip |
| Jim Larkin, et al. | | _ |
| | Defendant. | |

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, September 27, 2007:

MINUTE entry before Judge Mark Filip: Status hearing set for 10/4/2007 at 09:30 AM. Plaintiffs failure to appear at said status may result in dismissal of their case for want of prosecution. Mailed notice(tbk,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

United States District Court, Northern District of Illinois

| Name of Assigned Judge or Magistrate Judge | Mark Filip | Sitting Judge if Other than Assigned Judge | |
|---|------------|--|-----------|
| CASE NUMBER | 07 C 2713 | DATE | 10/4/2007 |
| CASE TITLE | Ві | roaddus vs. Larkin, | et al |

DOCKET ENTRY TEXT

Defendants appear for status hearing. Plaintiff fails to appear. The above-entitled case is dismissed for want of prosecution without prejudice and with leave to reinstate on or before 11/5/07 after which time the dismissal will be with prejudice if no request to reinstate is filed. Motion by defendant Jim Larkin for summary judgment [28] is stricken without prejudice with leave to reinstate.

Docketing to mail notices.

00:05

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| Courtroom Deputy Initials: | TBK |